

Civil Service Department City of New Orleans

FIRE DISTRICT CHIEF PROMOTIONAL APPEALS

DOCKET NUMBERS

#8594 PAUL HELMERS

#8629 EDWARD POOLE

#8649 JAY FIELDING

#8692 MICHAEL SALVAGGIO

VERSUS

DEPARTMENT OF FIRE

I. INTRODUCTION

The Civil Service Department received and processed the Fire District Chief promotional appeals of four Fire Captains “Appellants” protesting the Fire Superintendent’s “Appointing Authority” denial of their promotion pursuant to *Civil Service Commission Rule VI, Section 6.1*, which provides:

If any qualified candidate or employee, whose name appears on a verified appointment or promotional list, believes that his appointment, allocation or promotion has been improperly denied, he may protest the denial of such by presenting such forms or documents as the Director [of Personnel] may prescribe. The Director [of Personnel], or any person designated by him, may hold special hearings to determine the facts of such case and the Director [of Personnel] shall make his decision on the basis of the written statements, and forms presented by the employee and on the facts brought out in the hearing. The employee shall have the right to appeal to the Commission if dissatisfied with the action of the Director [of Personnel].

Pursuant to *Civil Service Rule VI, Section 6.1*, a special hearing was held on October 18, 2017 and on November 13, 2017 during which numerous witnesses were called and documents introduced. Upon completion of the hearing, the parties were directed to submit post-hearing memoranda articulating their positions.

The Appellants argue that the City of New Orleans Civil Service Commission ("Commission") has jurisdiction over their appeals because the promotional process utilized by the Appointing Authority as applied violated their constitutional rights protecting them from discrimination in the application of Civil Service Commission rules. Specifically, the Appellants contend that because Timothy McConnell ("McConnell" or "Appointing Authority"), the Superintendent of Fire, was unable to articulate specific merit-based reasons for his promotion decisions, his decision-making process was not merit based and is consequently violative of Article X, Section 7 of the Louisiana Constitution.

The Appellants further contend that the Appointing Authority violated *Civil Service Rule VI, Section 2.1* by disregarding the weighted and standardized testing performed by Civil Service, instead substituting his own fifteen factors with no explanation of the method for applying these factors. *Civil Service Rule VI, Section 2.1 provides that:*

Whenever an appointing authority proposes to fill a vacancy in the classified service, the appointing authority shall submit to the Department a statement showing the position to be filled, the duties thereof, the necessary and desirable qualifications of the person to be appointed thereto, and the proposed class, if known ...

Appointing Authority contends that he has the discretion to select any candidate who passed the promotional examination. To that end, he created an internal selection process that

included a review of the candidates' personnel files and resumes, as well as interviews with every qualified candidate. According to the Appointing Authority, during the interview each candidate was asked a uniform set of questions designed to help the interviewers better understand, among other things, the candidates' knowledge of the District Chief's responsibilities at a fire scene, and general management and leadership skills. He also created and utilized fifteen factors to be considered in the selection of individuals for promotion from the list of candidates who passed the promotional examination administered by the Department of Civil Service. Appellants argue that the use of this procedure created new qualifications that were not submitted to the Civil Service Department as required by civil service rules. The Appellants further argue that the Appointing Authority disregarded the weighted and standardized testing performed by the Civil Service Department, instead substituting his own "15 factor test" with no explanation of the method for applying the factors.

The Appellants' alternatively contend that the Appointing Authority violated Civil Service Rule VI, Section 3.1 by conducting an examination without the approval of the Personnel Director. Civil Service Rule VI, Section 3.1 authorizes examinations by the Appointing Authority and provides as follows:

The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

Because the Appointing Authority did not seek authority to administer his own examination, and no recorded evidence exists of the procedure's design to assess merit,

efficiency, fitness or length of service, the application of the fifteen factors and the resume and interview procedure violated Rule VI, Section 3.1.

The Appointing Authority contends that the Appellants failed to identify any improper denial of promotion that would suggest that the promotional selections made were not merit based. According to the Appointing Authority, the Appellants' arguments are primarily based upon the fact the Appointing Authority selected candidates for promotion who scored lower than them on the promotional examination. The Appointing Authority maintains that, under the current Civil Service Rules, which went into effect after the "Great Place to Work Initiative"¹ rule amendments, anyone who passes the examination is equally eligible for promotion and that the Appointing Authority may consider all candidates regardless of their ranking on the examination when selecting from the list of qualified applicants. Finally, the Appointing Authority argues that all Civil Service Commission rules concerning examinations and promotions were followed.

II. PROCEDURAL HISTORY AND FACTS

A. The Civil Service Department established a competitive, ranked list of eligibles for Fire District Chief in accordance with the Civil Service Commission Rules prior to the "Great Place to Work Initiative" Rule Amendments:

In observance of Civil Service Commission Rule VI, the Uniform Guidelines on Employee Selection Procedures and the Louisiana State Constitution, the Civil Service Department created

¹ The "Great Place to Work Initiative" was a series of 2014 rule amendments adopted by the Civil Service Commission to grant greater flexibility to appointing authorities with regard to recruitment, selection and compensation.

a merit-based, competitive Fire District Chief's examination based on a job analysis of the rank of Fire District Chief.

According to the Civil Service Commission's Rules, "the purpose of Rule VI is to ensure the efficient screening and assessment of applicants for promotion and appointment under a general system based on merit, efficiency, fitness and length of service as ascertained by examination which, so far as practical, shall be competitive." Further, Article X Section 7 of the Louisiana State Constitution requires that, "Permanent appointments and promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive."

The Uniform Guidelines on Employee Selection Procedures ("the Uniform Guidelines") apply to federal, private, and public employers subject to Title VII of the Civil Rights Act of 1964. According to the Equal Employment Opportunity Commission ("EEOC") the purpose of the Uniform Guidelines is to "aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin. The Federal agencies have adopted the Uniform Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsibilities."² Employers who follow

² (https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html)

the Uniform Guidelines are more likely to provide a strong defense against claims of unlawful discrimination.

In order to create a valid examination for Fire District Chief, Richard Carter, a trained Psychometrician with over 30 years of experience in test development and validation performed a job analysis, which consisted of a series of surveys and interviews of subject matter experts ("SME").

Mr. Carter testified that the Civil Service Department conducts a job analysis and utilizes competitive standardized tests to comply with the Louisiana Constitution, which mandates that promotions in the classified service be based upon merit and the certification of qualified candidates be competitive.

As part of the job analysis process the Fire Administration, at the request of Civil Service, provided a pool of 14 subject matter experts (3 Deputy Chiefs and 11 District Chiefs), which represented a cross-section of platoons and assignments; were representative of the racial make-up of the classifications represented; and were dependable and well-trusted.

The job analysis produced 16 areas of knowledge, skills and abilities ("KSA") that made up the job of Fire District Chief. The examination content was then devised by the Psychometrician to measure those KSAs identified during the job analysis. The exam consisted of three parts: a multiple choice test, scenario based job simulation and credit for training/education. In advance of the exam, all candidates were provided with the KSAs to be measured in each section of the exam, their weights toward the final score, and a definition of each KSA. A booklist was provided to all candidates in advance of the multiple choice exam. All questions on the multiple choice exam were taken from material on the booklist. Candidate

orientation sessions were required for all candidates prior to the job simulation. These orientation sessions provided information on what candidates could expect to see on the job simulation.

Assessors were brought in from other fire jurisdictions to score the job simulation using rating scales developed by the Psychometrician with SME input. Additionally, prior to making their ratings, the assessors received a handbook and on-site training on areas including the job analysis, KSAs and task list, techniques in behavioral observation, and how to avoid making common rating errors.

Following the administration and scoring of the exam, a competitive, ranked eligible list was established by Civil Service. Candidates were provided with their individual exam results. They were also given an opportunity to attend an optional individual feedback session during which they received a breakdown of their performance on each of the KSAs measured by the exam.

Richard Carter provided detailed testimony regarding the depth and importance of the competitive testing procedure. Mr. Carter explained how the written and oral examinations were standardized to accurately rank the performance of the applicants. As reflected by the record and Mr. Carter's testimony, the average score is always 1000. The scores ranged from 847 to 1175. The cutoff score was 891. The cutoff score was set to ensure the test did not have a disparate impact on African-American applicants. In making these calculations, he relied upon EEO Uniform Guidelines for Employee Selection Procedures.

Mr. Carter also explained the use of "banding" in the scoring and ranking of successful candidates. Banding is used to address race and gender discrimination and by its nature

addresses diversity issues. A statistical formula is used for determining the band width. Those individuals within the same band are considered tied so their actual score is not reported, although the candidates are listed in band order.

The Civil Service Department validates the candidates' test scores to show a positive correlation between the test scores and performance on the job. A higher test score is a verified indicator of better performance on the job. According to Mr. Carter, using a fifteen-factor test with no particular weight destroys the merit based, competitive nature of the test.

B. Impact of the "Great Place to Work Initiative"

The "Great Place to Work Initiative" was adopted in 2014 after 31 candidates were promoted. In 2016, McConnell requested a list of eligible candidates from the Civil Service Department. In response, the Civil Service Department provided McConnell with the ranked list of eligible candidates remaining from the 2012 list. (Joint Exhibit 4). Eighteen candidates remained on the list (bands 13-18). Of those eligible candidates, two retired and one withdrew, leaving fifteen eligible candidates.

As part of the process to be considered for promotion, McConnell required each candidate to submit a résumé and to participate in an interview. The record provides negligible evidence that personnel files, evaluations, or job performance were relied upon in the process. While those involved in the selection process testified that the same fifteen factors used in the Captain's promotion selection were used in the District Chief's promotion selection, there was scant testimony explaining how that was done on an individual basis.

The fifteen listed factors are as follows:

1. Effective application of department's safety and accountability procedures, and initiatives
2. Support for and effective implementation of the department's fire prevention strategies and initiatives
3. Performance history
4. Disciplinary history
5. Education
6. Résumé
7. Training
8. Demonstrated leadership
9. Interpersonal skills
10. Problem-solving skills
11. Years of service
12. Civil service examination score
13. Commendations, awards, recognition and accomplishments
14. Relevant experience
15. Additional relevant considerations, including any additional materials the candidates may wish to submit

Performance on the merit-based competitive civil service test was only one of fifteen factors considered.

McConnell prepared a list of interview questions that he asked each of the candidates. (Joint Exhibit 8). The Appellant's argue that the list included questions about controversial topics designed to elicit responses to indicate whether the candidate agreed with McConnell's management decisions, as opposed to whether the candidates would perform well as District Chiefs. Specific topics included smoke alarm canvassing and diversity, which the Appellants' considered politically sensitive issues.

On March 6, 2016, McConnell promoted four candidates including Henry Beba (band 14), Ryan Woods (band 14), Herman Franklin (band 15), and William Shanks (band 15). Appellant Michael Salvaggio (band 14) was not selected for promotion. On May 15, 2016, McConnell promoted Peter Lindblom (band 16). Appellants' Salvaggio (band 14), Hellmers (band 15), Poole (band 15), and Fielding (band 15) were not selected for promotion.

III.THE PROCESS UTILIZED BY THE FIRE DEPARTMENT TO SELECT CANDIDATES FROM THE CERTIFIED FIRE DISTRICT CHIEF LIST WAS NOT IN ACCORDANCE WITH THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Timothy McConnell is the Superintendent of Fire and, in that capacity, is responsible for filing vacancies within his department. He requested and was granted permission by the Department of Civil Service ("Civil Service") to fill vacancies in the District Chief classification.

In his testimony, McConnell explained the function of a District Chief and where the classification falls within the chain of command. The Fire Captain is a first-line supervisor, with direct supervisory authority over the rank and file employees. When fully staffed, every

firefighting apparatus should have an assigned Fire Captain who supervises three or four fire Apparatus Operators, Firefighters, or a combination of both. One hundred and sixty Fire Captains report directly to 35 District Chiefs who in turn report to Deputy Chiefs. Above the Deputy Chiefs are three Deputy Superintendents who comprise the Appointing Authority's executive staff. All of the District Chiefs perform essentially the same function and require the same skill set.

McConnell confirmed that he had no objections to any aspects of the testing process, including how it was administered, how the subject matter was weighted, or how the list was compiled. He testified that, under current Civil Service rules, everyone on the register who passed the test met the minimum qualifications and is considered a qualified candidate on the register. Therefore, he could promote anyone who passed the test and was on the list regardless of their rank order.

He also testified that, while the register provided by Civil Service provided a ranked list of candidates, no actual test scores were provided. Therefore, examination results only informed him that candidates passed and where the candidate ranked based upon their scores without knowing how much better or worse one candidate performed compared to another within their band.

When questioned regarding his decision-making process, McConnell emphasized that Civil Service rules were changed in September 2014 to allow him to consider "the entire person", which he took to mean looking at more than how a candidate performed on a test. Under the prior rule, applicants were placed in bands according to their test scores and

selected based upon job seniority within their band³. According to McConnell, the revised Civil Service rules provided no guidance or explanation as to how the process would work.

McConnell testified that he utilized the same factors that were contained in ADM-27 (Appellant 1), which is the internal policy that he used for making promotions in the Fire Captain classification. He confirmed that he did not seek review of or approval by Civil Service of the fifteen factors and that none of factors contained in the policy were given to Civil Service as desirable qualifications.

McConnell testified that an applicant's performance on the promotional examination received no more weight than any other factor. He acknowledged that he used both objective and subjective criteria describing training, education, and test scores as examples of objective factors. He also testified that observations made during the applicants' interviews may have resulted in certain subjective evaluations of the candidates. McConnell stated that he relied upon how well the candidates answered the pre-prepared questions that he posed to them. (Joint Exhibit 8). He testified that the candidates chosen gave better answers than the Appellants regarding their understanding of policy and the organizational structure, which he contended was important for "upper management" personnel.

Regarding the candidates' past performance, McConnell acknowledged that every candidate considered for promotion had the same performance history because he relied solely on the candidates' annual standardized performance evaluations to assess their performance. However, all candidates had received for the most part identical evaluations scores. Further,

³ Civil Service Rules do not require the use of job seniority as a selection criteria.

McConnell testified that he did not seek any input from the candidates' direct supervisors or their District Chiefs to evaluate their performance. McConnell also confirmed that no applicant's disciplinary record was considered when making promotional decisions.

The Appellants each testified regarding their qualifications and their performance as Fire Captains. Certain of the candidates that were chosen for promotion also testified. As expected, those that benefited from the change in the promotional process were supportive of the changes, while the Appellants supported a merit based system based upon test scores.

IV. EVALUATION OF SELECTION RATES

The Uniform Guidelines on Employee Selection state, "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact." The Uniform Guidelines further state, "The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part are satisfied."

The Civil Service Department recognizes that discrimination and disparate impact were not the focus of the hearing and that neither Party addressed allegations of discrimination during the course of the hearings. Nevertheless, it is the practice of the Civil Service Department to

conduct an adverse impact analysis of promotional practices. We include the initial findings of such an analysis for informational purposes only and do not make any legal conclusions. Omitting this information would have failed to reveal an additional area of concern and potential liability resulting from NOFD's promotional practices.

We include the statistical analysis in this report in order to adhere to the Commission's observation in *Achord et al. v. NOFD*, C.S. Nos. 8610 et seq. (5/24/2018) that such information may serve as a "cautionary tale" to appointing authorities seeking to supplement an appointment or promotion process with subjective measures.

V. ANALYSIS

A. Jurisdiction over Employer-Employee Disputes

The Louisiana Fourth Circuit Court of Appeal confirmed the jurisdiction of the Civil Service Commission in *Akins v. Housing Authority of New Orleans*, 856 So.2d 1220 (La.App. 4 Cir. 9/10/03), 856 So.2d 1220, *writ denied*, 2003-2781 (La.12/19/03), 861 So.2d 574, stating that:

It is well established in our jurisprudence that the Civil Service Commission has exclusive jurisdiction over classified civil service employer-employee disputes that are employment related. *La. Const. art. 10 sec. 10(A)(1)*. Article 10 provides as follows:

Section 10. (A) Rules (1) Powers.

Each commission is vested with broad and general rulemaking and subpoena powers for the administration and regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and other personnel matters and transactions; to adopt a uniform

pay and classification plan; to require an appointing authority to institute an employee training and safety program; and generally to accomplish the objectives and purposes of the merit system of civil service as herein established. It may make recommendations with respect to employee training and safety.

Equally important, *La. Const. art. 10 sec. 10(B)*, titled *Investigations*, provides that “each commission may investigate violations of this Part and the rules, statutes, or ordinances adopted pursuant hereto.” Therefore, this special hearing is investigative in nature and for fact finding purposes, as well as to specifically address the arguments set forth by the Appellants and the counter-arguments made by the Appointing Authority.

B. Appellants’ As-Applied Constitutional Claims

In the instant case, the Appellants have effectively shown that, while the Appointing Authority professes to have created an internal process that guides his promotional decisions, in practice the basis for promotion was entirely within the Appointing Authority’s discretion and not based upon any measurable merit based criteria. The utilization of many of the factors cannot be explained and, upon scrutiny, were never really considered at all. Based upon the record, it is clear that the fifteen factors were not utilized in an objective, much less explainable, manner.

There are glaring examples. The Promotional Committee reviewed performance evaluations, which were the same for all candidates. If the Appointing Authority wanted more discretion to make promotions, how could the Appointing Authority do so without considering a candidate’s past performance? It is unclear how the Appointing Authority measured candidates’ “leadership”, “problem solving”, and “interpersonal skills” without any knowledge of the candidates’ past performance. It would also have helped if the Appointing Authority’s

minutes reflected how well or poorly candidates performed in their interviews based upon the factors upon which he purportedly relied. In the instant case, all we have is the Appointing Authority's testimony that the candidates' answers to interview questions broke a tie as to which candidate would make the best leader, problem solver, and person with the best interpersonal skills.

The Louisiana Constitution mandates that promotions in the classified service be based upon merit and that the certification be competitive. La. Const. Art. X § 7. Further, one of the primary functions of the state and city civil service commissions of Louisiana is to ensure that rank and file state and city employees are selected competitively on the basis of merit, free from political influence.

The Appellants contend that the promotional process was not competitive or merit based. The crux of their argument is found on page 18 of their post-hearing brief:

In practice, the basis for promotions was entirely within the Superintendent's discretion. The Superintendent, after the list was certified by Civil Service, unilaterally applied a fifteen-factor test, in addition to including forming a Promotion Committee and requiring an interview and current resume. Further, the criteria for selection from the ranked list already provided by Civil Service included 8.1.3.6, "Support for and the effective implementation of the department's fire prevention strategies and initiatives," 8.1.3.6 "Resume," 8.1.3.5 "Education" 8.1.3.8 "Demonstrated Leadership, 8.1.3.9 "Interpersonal Skills." Therefore, instead of participating in the development of objective criteria for the ranked promotional list under Rule VI,2.1, the Superintendent, after the list was finalized, destroyed the competitive, merit-based test developed by Civil Service. This test was developed and validated by Civil Service personnel with significant effort by all involved, and at significant cost to the taxpayers of the City of New Orleans. McConnell used an unstructured interview, and then based decisions on factors unrelated to job performance. Even when the questions were job related, McConnell's memory of the candidates' performance was not reliable, and neither McConnell nor the deputy superintendents kept records or scored the interview.

To allay concerns regarding disparate impact, the cut off score must be so low that virtually every candidate who takes the test passes it. Therefore, for all practical purposes, it becomes a pass-fail test if the Appointing Authority can reach down to the bottom of the list basically ignoring a competitive test to promote a significantly less qualified applicant for promotion. Such a practice is adverse to a merit system and is clearly in violation of La. Const. Art. X § 7.

The Appointing Authority's unstructured interview process allowed for non-merit based selections. From their testimony in the instant case, every candidate seemed qualified to perform the duties of a District Chief. However, determining who is **best** qualified based upon their testimony in an administrative hearing is no more reliable than the Superintendent's unstructured interview. That is why so much time, effort, and expense is expended in the creation of a competitive merit based examination. While the District Chief position is an important supervisory position, it is not an executive level position that requires the same political sensitivities as an unclassified position. Questions that are not specially related to the job at hand seem improper; particularly if those questions are used by the Appointing Authority to decide who receives a promotion.

As will be discussed below, Civil Service rules provide a mechanism for adding new requirements that the Appointing Authority believes are important. However, the Appointing Authority cannot add those requirements unilaterally.

C. Application of Civil Service Rules in The Selection Process

The Appellants' contend that the Appointing Authority violated *Civil Service Commission Rule VI, Section 2.1* by adding desirable requirements to the position of Fire Captain and applying those factors without the assistance of Civil Service as to weight or standardization.

Civil Service Commission Rule VI, Section 2.1 provides:

Whenever an appointing authority proposes to fill a vacancy in the classified service, the appointing authority shall submit to the Department a statement showing the position to be filled, the duties thereof, the necessary and desirable qualifications of the person to be appointed thereto, and the proposed class, if known. The Department shall approve or deny the position allocation within seven (7) days for existing classifications and fifteen (15) days for new classifications, exclusive of Commission approval. The Department shall announce each vacancy within thirty (30) days of an approved allocation. The Department shall not withhold reasonable approval of the request unless it can demonstrate that the request violates the principles of the merit system... If the appointing authority and the Director disagree on the position's minimum qualifications or the class allocation and are unable to resolve their disagreement, the issue may be brought before the Commission for a decision.

The record clearly establishes that the District Chief's examination was thorough, fair, and comprehensive. The Appointing Authority chose the subject matter experts employed by the Fire Department that assisted Civil Service in the creation of the examination. The examination was also transparent. The Appointing Authority and Civil Service communicated to the applicants the materials they should study, the areas the examination would cover, and the weighted importance of each area of examination. Further, the examination appeared balanced between textbook knowledge and practical knowledge in that there was both a written test and an oral job simulation examination. It also appears that the examination focused on many of the areas that the Appointing Authority listed as factors in ADM-27, particularly decision making and leadership skills. The Appointing Authority had no criticism of

the examination and seemed comfortable that everyone who passed the examination demonstrated that they could perform the functions of the position he sought to fill.

After reviewing the examination process, it seems clear that the level of success on the examination is far more than a starting point, and that the Appointing Authority can only consider other factors in the promotional decision-making process if those factors are submitted and determined by the Civil Service Department to be a true measure of merit and calculated to predict the candidate's success in a higher-level position.

The record demonstrates that the Appointing Authority could benefit from review and guidance from the Department of Civil Service. In a paramilitary organization, transparency is extremely important. Where career altering decisions lack transparency, favoritism is suspected. That is particularly true in all governmental environments where decisions may be influenced by considerations that have little to do with a merit based promotional system. If Civil Service, with the assistance of the Appointing Authority, can prepare a test, it can also assist with the creation of customized promotion plans with weighted criteria beyond a test score.

In the instant case, McConnell disregarded the weighted and standardized testing performed by the Civil Service Department, instead substituting his own 15 factors with no explanation of the method of applying these factors. Therefore, McConnell added requirements to the position of District Chief and then applied those factors without the assistance of the Civil Service Department as to weight or standardization. His failure to follow these guidelines violates Civil Service Rule VI, Section 2.1.

The Appellants further contend that the Appointing Authority violated *Civil Service Commission Rule VI, Section 3.1* by conducting an examination without approval of the Personnel Director.

Civil Service Commission Rule VI, Section 3.1 provides:

The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

In the instant case, the Appointing Authority used an unstructured oral interview to test the Appellants' knowledge of areas he deemed important. For example, as reflected in his interview questions, he quizzed the Appellants' on their knowledge of the organizational structure of the NOFD and favored certain candidates over others based upon their ability to answer the question. This process was never reviewed or authorized by the Personnel Director as required by Civil Service Commission's Rule VI, Section 3.1. As reflected above, other questions tested the Appellants' opinions regarding departmental policy. If the Appointing Authority wishes to use the current register and supplement the already administered test with additional questions, he must first seek review and approval as required by Civil Service rules. The Appointing Authority may also request a new test for the creation of a new register.

D. Procedural Due Process

Finally, as long as the Appointing Authority continues to use the eligibility list created in 2012 that ranks candidates in bands based upon test scores, the Appellants' have a vested property interest in their promotions as dictated by the rules in effect when the list was

created. The “Great Place to Work” initiative was not promulgated retroactively and, consequently, it is a violation of procedural due process to take away the Appellants’ right to a promotion without due process of law. The eligibility list was created under previous rules that assured a right to a promotion to the candidate that reached the highest band remaining on the eligibility list over candidates from lower bands.

VI. CONCLUSION

While it is no longer mandatory for the Fire Superintendent to select from a narrower band of three (3) candidates, the Superintendent is still obligated to use the list to inform his hiring and promotion decisions. The new “Great Place to Work” rules are not intended to give the Superintendent the power to create an additional scheme of requirements and qualifications, especially when this additional scheme was adopted in violation of Civil Service Rules. Moreover, the seemingly arbitrary manner in which the Superintendent selected candidates for promotion violates the Louisiana Constitution, which mandates a merit-based, competitive selection process, based on competitive examinations.

Keeping in mind the fairness and merit-based selection system enshrined in the Louisiana Constitution, and after reviewing the examination process, it seems clear that the level of success on the examination should be more than a starting point and that the Appointing Authority should give candidates’ exam scores appropriate weight in the promotional decision-making process for Fire District Chief. It is an objective measure of a candidate’s knowledge, skills and abilities. Furthermore, if all but a handful of candidates pass the examination, in this case 49 out of 52, the list should be followed absent compelling factors.

To do otherwise, and to pick anywhere from the list would render the exam meaningless and detracts from the competitive nature of the examination process. A promotion is no longer merit based if the appointing authority can for all practical purposes pick anyone he wants from a competitive list.

This is particularly true when applied to the Fire Department, which is a paramilitary department, functioning very differently from the other departments. It is a highly structured hierarchy, relying on a clear chain of command, and specialized skills. Transparency and competitiveness are of course important in all departments; however, in the case of the Fire Department with a structured chain of command, the need for subordinates and supervisors to feel confident in that competitive selection process is even more important. For a person to follow the orders of superiors, they must feel confident in the selection process that forged the chain of command.

Although the Fire Superintendent reasonably believed that the rule changes gave him as the appointing authority absolute discretion to select anyone from the list, and to use his own subjective and perhaps objective reasons to give one passing candidate preference over another, such a reading violates the Constitution and Civil Service Rules. The discretion provided under the “Great Place to Work” amendments must be read in light of the applicable Constitutional protections and the other Civil Service provisions. Using discretion when selecting candidates from a ranked list should be the exception, not the rule, at least as applied to paramilitary departments like a fire department. When the ranked list is deviated from, a strong and credible reason should be given.

It would also be of benefit for the Fire Superintendent to coordinate with the Civil Service Department during the job analysis, if he believes that other factors should be considered, or in developing an interview plan. This would also add to the sense of transparency and legitimacy to the process.

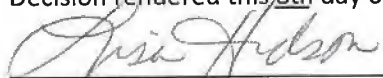
In this instance, the “Great Place to Work” amendments were unconstitutional as applied. By selecting applicants from anywhere on the ranked list, without adequate justification, the Superintendent ultimately made decisions based on non-merit factors, which violates the Louisiana Constitution and Civil Service Rules. These amendments should be read narrowly, requiring adherence to the ranked list absent strong and credible factors, and utilizing additional criteria only if consistently applied—such as a conducting interviews using a consistent interview plan, and applying selection criteria in a fair and consistent manner after consultation with the Civil Service Department.

VII. REMEDY

The remedy for this situation is problematic as there are competing equities to consider. The most logical approach would be to start all over again. Those promoted would be reinstated to their former position and the Fire Superintendent would work from the competitive, ranked list provided to him. Absent a merit-based, well-articulated and documented reason, he would use the ranked order to make his selection. However, that would arguably be inequitable to those who have been promoted and now arguably have an interest in their position. Considering the equities of this situation, those who were promoted, though unconstitutionally, should remain in their position.

Because the Fire Superintendent promoted candidates on March 6, 2016, from lower bands than Appellant Michael Salvaggio, he is ordered promoted retroactive to March 6, 2016. Because the Fire Superintendent promoted an additional candidate on May 15, 2016, from a lower band than Appellants Paul Hellmers, Edward Poole, and Jay Fielding, they are ordered promoted retroactive to May 15, 2016. If this is not possible, then it is ordered that the individuals be promoted once vacancies become available and be compensated with the difference in salary retroactively from the dates they should have been promoted until they are actually promoted to remediate their respective losses.

Decision rendered this 8th day of November, 2018.



LISA M. HUDSON
PERSONNEL DIRECTOR

11/8/18

DATE

Attachment 1

As noted in the Hearing Examiner's report, the Fire Superintendent selected 25 candidates out of the 49 candidates eligible for promotion in October of 2012, 3 candidates in February 2013, 3 candidates in February 2014, 4 candidates in March 2016, and 1 in May 2016. The Fire Superintendent testified that candidates were selected for appointment based upon the considerations contained within promotional Adm-27. In keeping with the Uniform Guidelines, the Civil Service Department conducted an adverse impact analysis on these selection results.

The following is a racial breakdown of the total group of candidates who passed the examination:

Totals for Race	Number of candidates	Percent of total
White	34	69%
African American	14	29%
Hispanic	01	2%
Total	49	100%

The following table provides the percentages for those candidates actually selected (promoted):

Totals for Race	Number of candidates	Percent of total
White	26	72%
African American	9	25%
Hispanic	1	3%
Total	36	100%

Selection Rate for Whites = $26/34 = 76\%$

Selection Rate for African Americans = $9/14 = 64\%$

Adverse impact is described by the Uniform Guidelines as “a selection rate for any race, sex, or ethnic group which is less than four-fifths ($4/5$) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” In this case, Whites were promoted at a greater rate than African Americans. 64% of African Americans were promoted vs. 72% of Whites. However, the selection rate for African Americans, the protected group, is 84% ($.64/.76$) that of Whites, the non-protected group. This difference does not represent a violation of the $4/5$ ths rule of thumb ($.84$ vs. $.80$).

Additionally, it should be noted there was only 1 Hispanic on the list; he was promoted. There were no females on the eligible list.